Supreme Court, U.S.
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No. 99-1420

IN THE

Supreme Court of the United States

NANCY LANTHORN ELLIS, *et al.*,

Petitioners,

v.

WASHINGTON COUNTY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case is fact intensive. In the interest of brevity, the respondents submit the following outline of significant circumstances and events:[1]

August 2, 1994

- At 12:04 p.m., Johnson City public safety officers responded to a 911 call initiated by a young woman reporting that a person was breaking into her home. [App. 100, 299, 341]

- At 12:35 p.m., following his arrest for public intoxication and criminal trespassing, Craig Lanthorn (deceased) was booked into the Johnson City Jail by Laura Bolton. [App. 103-104] When asked if he was in need of medical treatment, Lanthorn responded "No." [App. 103-104, 147]

- At 2:00 p.m., a kicking noise was heard in the vicinity of Lanthorn's cell and Jailer Sam Garland investigated the disturbance. [App. 254-255] Lanthorn told Garland he was having a seizure and wanted to go to the hospital. [App. 256, 258] In accord with protocol, Garland had Emergency Medical Services (EMS) summoned, and medical personnel Doug Green and Johnny Miller arrived within a matter of minutes. [App. 254–258, 269, 667] During the brief interim before EMS arrived, Garland returned to Lanthorn's cell, opened the door and was kicked by

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1. All references are to the Joint Appendix page number "[App. __]."

Lanthorn who was barefooted and lying on the floor. [App. 259] Wearing a black tennis shoe, Garland put his foot on Lanthorn's shin or ankle to prevent the kicking, applied very little force and told Lanthorn emergency aid was on the way. [App. 668-669]

- Lanthorn's medical examination at 2:05 p.m. resulted in a finding that he was not having a seizure. [App. 270, 276] Medical records reflect that Lanthorn was anxious, nervous, communicative and making sense; oriented to person, place and time; wanted medication; pulse regular, blood pressure normal, respiration regular and non-labored; pupils equal and reactive; skin dry, warm and normal in color. [App. 268, 271, 273-274, 284-286] EMT Green developed a rapport with Lanthorn during this medical examination and saw no evidence of suicidal tendencies in Lanthorn. [App. 288, 291] EMT Green testified that if he thought Lanthorn had needed a physician or that he was medically deteriorating he would have transported him to the hospital, involuntarily if necessary. [App. 291] Toward the end of Lanthorn's medical examination, he told EMT Green that he had been "kicked by the police" and identified his upper torso as being the location where he had been kicked or injured. [App. 275, 277-278] Green had Lanthorn remove his shirt and found no evidence of bruising or any signs of injury. [App. 275]

- EMT Green advised Jailers Garland and Bolton that Lanthorn was "okay to serve his time," and this was contemporaneously noted on the jail log. [App. 60, 66-67, 110, 260-261] EMT Green testified that Lanthorn told him he wanted his anxiety

medication. EMT Green says he told Jailer Garland "he might want to check with [Lanthorn's] doctor and see if he needs his medications." [App. 274, 280] Although this testimony must be assumed to be true for purposes of summary judgment, Jailer Garland denies this statement was made and consequently, no contact was made.

- EMT Green asked Jailer Garland to sign the EMS trip report on a line reflecting "refused transport." [App. 282] EMT Green testified that he was simply asking Jailer Garland to sign on behalf of Lanthorn reflecting Lanthorn's declining of EMT Green's offer to transport him to the hospital. [App. 282-283] EMT Green has testified that Jailer Garland did not in any way refuse or prevent Lanthorn from being transported. [App. 289]

- After approximately four (4) hours in the "drunk tank", Lanthorn was transferred to a regular cell block where he had unrestricted access to a telephone. He used this telephone extensively — calling his mother on at least four (4) occasions, his father, aunt, uncle, grandmother, mother's fiancé and family friends. [App. 152, 216, 239-240, 249, 252-253, 295, 298, 328-329]

- At approximately 7:00 p.m., during the evening shift, a local attorney and his wife (who is also an attorney and pro se prisoner law clerk working within the Northeast Division of Tennessee's Federal District Court) arrived at the City Jail seeking a visit with Lanthorn. [App. 180, 197] The jailer on duty initially thought this was an attorney/client visit, but he soon

learned that the attorneys were Lanthorn's aunt and uncle. [App. 196-197] Even though personal visitation is permitted only on scheduled days and times, the visitation was allowed. [App. 744]

- The aunt and uncle testified that during their visit with their nephew he was speaking slowly and deliberately, but he was sensible, rational and not anxious. [App. 166, 172] According to the aunt and uncle, Lanthorn was not apathetic, despondent or withdrawn, and there was no observation by them of his being compulsive, agitated, hostile or delusional. He did not have trouble communicating with his aunt or uncle, and to the extent of their abilities, they saw nothing leading them to think he might be suicidal. [App. 158-160, 163-166, 167-169, 172] They had no reservations about Lanthorn's emotional stability. [App. 171, 176, 178] Lanthorn did "tear up" but did not cry when his aunt hugged him and told him she loved him as she was leaving. [App. 161-162]

- During the evening shift (4:00 p.m. to midnight), Lanthorn talked by telephone to his mother, a practicing clinical psychologist, on at least four (4) occasions, speaking with her for a total of about forty (40) minutes. [App. 239-240] Lanthorn talked to his father, also a practicing clinical psychologist, on several occasions by telephone while in the City Jail. [App. 326-327] Dr. Lanthorn testified about his experience treating and assessing suicidal patients and candidly acknowledged that he did not develop concerns about suicide or self-harm during any of his conversations with his son. [App. 326-329, 330-334] Dr. Lanthorn is not a party to this litigation, it being brought only by Lanthorn's mother, Dr. Ellis.

- During one of Dr. Ellis's telephone conversations with her son and because of her knowledge of a past suicidal episode by him, she asked him if he was thinking about hurting himself. He replied, "No," and she was satisfied with that. [App. 237-238] Lanthorn also had five (5) separate telephone conversations with his grandmother. She did not detect any suicidal notions and described Lanthorn as articulate and rational even though his speech seemed slurred. [App. 295-296, 298]

August 3, 1994

- From midnight to 8:00 a.m., Lanthorn slept through the night without disturbance or difficulties. [App. 811]

- Even though Lanthorn's troubled past was well known to his parents and, in large measure, to other family members who had contact with Lanthorn while in the City Jail, no information about his medical or psychiatric history was provided to the City Jail staff. [App. 151, 169, 178, 218, 224, 226, 231, 234-235] Lanthorn's history included the use of hard drugs, cult participation, a rape never reported to police, a near death experience brought about by intravenous drug usage and an involuntary commitment to a psychiatric hospital about which he was very bitter. [App. 218, 220-221, 223, 225-231, 234-235, 240, 318-325, 335-338, 347, 873, 875-877] The physician listed on Lanthorn's jail intake form had actually terminated the doctor/patient relationship due to Lanthorn's excessive consumption of prescribed drugs and angry demands for more. [App. 103-104,

810, 832-840] Another psychiatrist who had treated Lanthorn for panic attacks and anxiety testified that Lanthorn would not be sleeping through the night in the City Jail if he were having such an episode, as the plaintiffs in this case originally claimed. [App. 505, 853-859, 863-865, 872]

- At approximately 8:30 a.m., Lanthorn was arraigned before Judge William Mooney. [App. 267] Following his arraignment, Lanthorn continued to use the telephone located in his cell. A family friend, whom Lanthorn called, described him as upset but rational. [App. 247] This family friend was familiar with Lanthorn's long-standing drug problems and past suicidal episode. When Lanthorn told her she was his "last chance," she developed a concern about him. This concern was relayed to Lanthorn's mother, Dr. Ellis, but no one contacted the jail to report any concern. [App. 243-245, 247-253]

- At 10:30 a.m., Lanthorn was transferred from the City Jail to the Washington County Jail, along with a copy of the City Jail's intake form which reflected he had been checked by the rescue squad for a seizure and that he was "okay". [App. 103-104, 131, 313, 373-374]

- At 10:45 a.m., Lanthorn arrived at the County Jail and was promptly placed in a holding cell on the second floor across from the front desk. [App. 460] A short time later, Lanthorn was interviewed by booking Jailer Wanda Robertson. [App. 471-472] Lanthorn related to her that he was not suicidal, that he loved life, and wanted to be where he could smoke cigarettes. [App. 472-473]

- At approximately 11:00 a.m., Jailer Billy Mitchell came on duty. Upon hearing other jailers discussing the various inmates who had arrived from the City Jail that morning, he recognized Lanthorn's name because he had transported Lanthorn to a psychiatric hospital about a month previously, and he informed his supervisor Sergeant R. D. Jamerson. [App. 377, 379] When informed of this fact, Sergeant Jamerson instructed Jailer Mitchell to check on Lanthorn and to determine whether Lanthorn needed to be on suicide watch or whether he could be placed in cell block B-4, the least crowded cell block. [App. 379-381]

- Jailer Mitchell went to the second floor to check on Lanthorn and found him engaged in another telephone conversation with his mother, Dr. Ellis. [App. 381] Eventually, Jailer Mitchell spoke with Lanthorn and addressed such topics as what had occurred to bring about his arrest, the likely disposition of his charges when he appeared in court and, ultimately, the issue of whether he was suicidal. [App. 382-383] Lanthorn responded, "Hell, no. I love life. I've got a baby on the way. You know, I've got to support my child." [App. 382] Following this conversation, which included Lanthorn's repeated requests to be placed where he could smoke cigarettes, Jailer Mitchell told Jailer John Cline that Lanthorn could be assigned to cell block B-4 and then assisted in Lanthorn's procurement of some cigarettes from these inmates. [App. 382-383] The cell block to which Lanthorn was assigned was not a suicide watch cell, but it did have a camera on one end that transmitted from the cell block to a monitor in a manned downstairs office.

[App. 453, 469] The monitors were not continuously watched, but rather had been installed as a security measure. [App. 450-451, 453]

- Lanthorn was placed in cell block B-4 at about 11:45 a.m. [App. 383] During a walk around between 12:15 or 12:30, Lanthorn was observed lying on a mat, and he asked for a television. Approximately one hour after that, he appeared to be asleep. [App. 383-384]

- At approximately 1:55 p.m., kicking and yelling were heard from cell block B-4, and two jailers immediately ran to the cell block where they observed Lanthorn hanging from the cell bars by a noose fashioned from a sheet. [App. 385] Lanthorn was unconscious, CPR was immediately instituted, rescue personnel were summoned, and Lanthorn was transferred to a medical center where he died the following day when life support systems were withdrawn. [App. 385, 470]

- Based on the telephone conversation Dr. Nancy Ellis had shortly before Lanthorn was placed in cell block B-4, Dr. Ellis expressed in a letter her written opinion that her son was *not* suicidal at the time she spoke with him. [App. 461-462, 474]

1. The Petition misrepresents the medical attention received by Craig Lanthorn in the City Jail.

Petitioners assert on page 3 that when Jailer Garland first discovered that Lanthorn was claiming to have had a seizure, "Lanthorn's pleas were ignored. APP. at 13a." However, if one looks at page 13a of the Petitioners' appendix, what one finds is that Jailer Garland summoned emergency medical personnel.

The Petition overlooks the undisputed facts that the medical personnel determined that Lanthorn was not having a seizure and that he did not need to go to the hospital. [App. 260-261, 270, 276] Petitioners also overlook the undisputed proof that EMT Green testified that, notwithstanding his professional opinion that Lanthorn did not need to be transported to the hospital, he offered to transport Lanthorn anyway and Lanthorn declined. [App. 281-282, 293-294] Furthermore, it is undisputed that Jailer Garland signed the refusal to transport line on the EMS form on behalf of Lanthorn at the instruction of EMT Green. [App. 282]

2. The Petition misrepresents that City jailers were inadequately trained on the topic of suicide prevention and further misrepresents that the City falsified its training records to obtain jail certification.

To advance a "failure to train" claim, the proper inquiry is whether the municipality's established program/curriculum is deficient and if a policymaker was aware of the deficiency such that it can be said the municipality was "deliberately indifferent" to critical training needs. *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989). In *Canton*, this Court anticipated the ease with which a failure to train argument could be advanced for any injury befalling those in the custody of law enforcement officers and expressly limited its use to protect the core concept that it is *abusive* government conduct the constitution seeks to prevent.

Petitioners assert on pages 6 and 16 of their brief that Johnson City "failed to make any reasonable effort to train their jailers" and "went to the trouble of falsifying its training records to create the appearance that such training had been

given." Petitioners' assertions are reckless, unsupported by the record, beyond the bounds of advocacy and overstatement to the point of misrepresentation. The following facts are undisputed:

- Johnson City has a written policy directed to the detection and proper handling of suicidal inmates. [App. 112-126] All City jailers were provided a copy of this policy and testified to their familiarity with it. [App. 199, 200]

- The Tennessee Corrections Institute, (T.C.I.), a state agency, conducts a basic jail school designed to train local government jail employees shortly after employment. [App. 198-200] The basic jail school curriculum includes the topic of custodial suicides. [App. 188-199, 694] Every Johnson City jailer attended this forty (40) hour T.C.I. conducted training program. [App. 134-146, 185-186, 198-200, 672, 674-675]

- Until 1992, T.C.I. sponsored a forty (40) hour annual training program to which local government jailers could be sent. Participation in the program served as one criteria for the facility in which they were employed to be certified by the State of Tennessee. [App. 898] All Johnson City jailers participated in this pre-1992 annual training program. [App. 890-896]

- Starting in 1992, T.C.I. reduced the number of annual instructional hours to sixteen (16) that it could provide to jail employees whose governmental entity employer desired to maintain a certified facility. [App.

201-205] In 1992, 1993 and 1994, T.C.I. provided training on the topic of suicide, medical and psychological identification, during the sixteen (16) hour T.C.I. sponsored training sessions. All Johnson City jailers participated in this training program. [App. 132-146, 150, 185-189, 198-200, 672, 674-675, 812–813]

- After 1992, to be designated by the State of Tennessee as a "certified jail", an additional twenty-four (24) hours of annual training for jail staff had to be coordinated or taught locally by a designated "field training officer" (F.T.O.) [App. 201-202] Johnson City designated Ken Hall as its F.T.O. to perform this function.

Petitioners' assertion that the City of Johnson City falsified its training records stems from bootstrapping the testimony of two (2) Johnson City jailers that, in their opinions, Field Training Officer Hall did a less than adequate job in 1992 and 1993 in providing the twenty-four (24) hours of local training. [App. 672-675] Even if F.T.O. Hall's training efforts were inadequate, exaggerated by him, or the training he did provide is disregarded entirely for the sake of argument, a claim against Johnson City on a failure to train theory fails for three (3) reasons:

(A) All Johnson City jailers received custodial suicide prevention training from T.C.I. sponsored courses;

(B) Hall is not a policymaker for the City of Johnson City, and his actions are not attributable to the City;

(C) Lanthorn did not die in Johnson City's jail, and the conduct of the City's jailers was not a proximate cause of his death.

3. The Petition improperly treats each individual Respondent as if he had knowledge of all factual allegations supporting Petitioners' claim.

For example, there is no evidence in the record that Jailer Garland had any knowledge of what occurred at the scene of the arrest. See Petitioners' Brief at page 2. In fact, the undisputed proof is that Jailer Garland was not at the Johnson City Jail at the time of Lanthorn's booking, and his first knowledge or contact with Lanthorn was at the time he first heard Lanthorn creating a disturbance in his cell.

The best example of this misrepresentation is contained in the Questions Presented for Review in the Petition. The first question reads as follows:

> Whether jailers are deliberately indifferent when they know of a detainee's disorientation, despondency, history of psychiatric care, recent involuntary commitment for suicide, and multiple requests for medical care, but refused to provide either medical care or protection from self-injury.

With respect to Jailer Garland, the Petitioners set forth no facts that he had knowledge that Lanthorn was despondent, had a history of psychiatric care, had a recent involuntary commitment for suicide or made any requests for medical care to any person after the EMS arrived. The undisputed testimony is that Lanthorn claimed (and acted like) he was having a seizure. Lanthorn asked to go to the hospital and Jailer Garland immediately had the EMS summoned. Petitioners similarly treat each individual Respondent and, thus, misrepresent the knowledge each had as to Lanthorn's condition and history.

4. The Petition misrepresents the evidence that Lanthorn was kicked or abused by Jailer Garland.

Jailer Garland's undisputed testimony is that, upon returning to Lanthorn's cell (while waiting for the emergency medical personnel to arrive), Lanthorn kicked Jailer Garland, and Jailer Garland placed his foot on Lanthorn's leg (between the foot and knee). [App. 668-669] Doctor Blake's testimony was that the autopsy revealed a bruise in the buttocks area consistent with a shoe print or stomp. However, Dr. Blake could not offer that opinion to a reasonable degree of medical certainty. [App. 496-497] Furthermore, as the District Court found, based upon the age of the bruise, it could have occurred while Lanthorn was in the Johnson City Jail, but it also could have occurred before he arrived. [Petition 70a-71a] Finally, the District Court held that an alleged statement by Lanthorn identifying Jailer Garland as his assailant was inadmissible hearsay, and this ruling was not contested in the Sixth Circuit. [Petition 71a-72a]

5. The Petition misrepresents how the decision to place Lanthorn in cell block B-4 was made.

Petitioners assert that Jailer Mitchell made a decision about Lanthorn's placement in B-4 "without reviewing the booking card or discussing Lanthorn's condition with [Jailer] Robertson." [Petition 5] Jailer Mitchell had been told by his supervisor, Sergeant Jamerson, to go and speak to Lanthorn and determine whether he needed to be placed on suicide watch or whether he could be placed in cell block B-4, the least crowded of the cell blocks that day. [App. 381] Mitchell spoke with Lanthorn and asked him if he was suicidal. Lanthorn responded, "Hell, no. I love life. I've got a baby on the way. You know, I've got to support my child."

[App. 382] Jailer Robertson, the jailer who had booked Lanthorn and was in charge of the third floor of the jail that day, was present during Jailer Mitchell's conversation with Lanthorn and when Jailer Mitchell subsequently told Jailer Cline, the officer in charge of the second floor of the jail where B-4 was located, that he thought Lanthorn could go in B-4. [App. 381-382, 393] Jailer Mitchell and Jailer Cline discussed what Sergeant Jamerson had said about placing Lanthorn in B-4 and agreed it was fine to put him in there. [App. 392] Jailer Mitchell believed he was putting Lanthorn where he wanted to be because Lanthorn had indicated he wanted to smoke and could smoke in B-4. [App. 382-383]

6. The Petition misrepresents that competent evidence exists suggesting that Sergeant Jamerson observed Lanthorn placing his head in a noose and did not react.

Presumably in an effort to garner this Court's attention, Petitioners also assert that Sergeant Jamerson saw Lanthorn putting his head in a noose on a video monitor, but failed to alert anyone until at least ten minutes later. [Petition 6] This statement is both irrelevant and unsupported in the record by any admissible evidence.

The statement is irrelevant because Petitioners' claim against Sergeant Jamerson based upon this allegation is not before this Court, but remains in the district court. The district court granted all of Defendants' motions for summary judgment with respect to Petitioners' section 1983 claims, with the exception of one claim against Jamerson. [Petition 42a] That claim is based solely upon Sergeant Jamerson's alleged delay in summoning help after allegedly observing Lanthorn in the process of committing suicide, allegations

that are in turn based solely upon certain statements former Sheriff Ron England made to the media concerning what Sergeant Jamerson saw. [Petition 65a] In essence, England's statements suggested that Sergeant Jamerson saw Lanthorn committing suicide, while Sergeant Jamerson always has maintained that he saw Lanthorn hanging motionless. [App. 432, 1033-34]

At the time Petitioners appealed the district court's dismissal of all the other section 1983 claims to the United States Court of Appeals for the Sixth Circuit, Sergeant Jamerson appealed the district court's denial of his motion for summary judgment. Jamerson's cross-appeal was based upon the ground that the statements of Sheriff England (who was not at the jail and had no personal knowledge concerning the incident) were inadmissible hearsay, and no other evidence suggests that Sergeant Jamerson either observed Lanthorn in the act of committing suicide or delayed summoning help once he saw Lanthorn hanging on the video monitor. As the record reflects, the Sixth Circuit affirmed the district court's dismissal of Petitioners' section 1983 claims based upon everything other than the allegation against Sergeant Jamerson, and dismissed Sergeant Jamerson's appeal on the ground that the Court of Appeals had no appellate jurisdiction over Sergeant Jamerson's appeal given the posture of the case. [Petition 10a] The Sixth Circuit also observed, however, that Petitioners' claim against Sergeant Jamerson was based upon "the rankest type of inadmissible hearsay" that was "unreliable and inadmissible in evidence." [Petition 10a] Thus, Petitioners' claim based upon the allegation that Sergeant Jamerson observed Lanthorn in the act of committing suicide and delayed reporting it remains in the district court, supported only by the inadmissible hearsay uttered by Sheriff England to the press, and is irrelevant to this Petition.

7. The Petition misrepresents that Washington County's jailers were untrained or inexperienced in suicide prevention and misrepresents that any action or inaction by Washington County jailers was causally connected to Lanthorn's death.

Washington County had a written policy for preliminarily screening those inmates who may have had a physical or mental condition that could be a threat to the health of the inmate or to the health of other inmates. [App. 477] After Lanthorn was transferred from the Johnson City Jail to the Washington County Jail in Jonesborough, Tennessee, he was seen by Sergeant Castle, Sergeant Jamerson, Jailer Cline, Jailer Robertson, and Jailer Mitchell. All of these individuals had successfully completed the forty (40) hours of basic jail school conducted by the Tennessee Corrections Institute, [App. 577-580] which included instruction on screening jail inmates who represented potential suicide risks. [App. 468] Indeed, Lanthorn was detained in a holding cell for observation and assessment before he was assigned to a cell with members of the jail population. [App. 380] While he was in the holding cell, Jailer Mitchell conducted an extensive assessment of Lanthorn which included personal observation and an exchange of oral communication, all of which convinced Jailer Mitchell that Lanthorn did not appear to be suicidal before he advised Jailer Cline that Lanthorn should be assigned to cell block B-4 with other members of the jail population. [App. 382-383] Lanthorn was then physically placed in cell block B-4 at about 11:45 a.m. [App. 383] Interestingly, at around 11:30 a.m. Lanthorn's mother, Dr. Nancy Ellis, a clinical psychologist whose clinical practice included providing therapy to individuals who had suicidal ideations and tendencies, [App. 461] had a telephone

conversation with her son at the Washington County Jail. Based on that conversation with her son, Dr. Ellis later expressed her opinion that Lanthorn was *not* suicidal [App. 474]

While Petitioners criticize the training policy of the City of Johnson City and Washington County, the record fails to point or direct us to any evidence that either Johnson City or Washington County had training programs that were deficient in any way. Neither do Petitioners direct us to any evidence of how a better training program on the part of Johnson City and Washington County could have prevented Craig Lanthorn's death. While it is true that proximate cause is generally a question for the jury, the burden remains with Petitioners, as in all civil cases, to establish by some evidence the issue of proximate causation. The Courts are not required to guess or infer the question of proximate cause. *Oklahoma v. Brown*, 117 S. Ct. 1382 (1997).

Throughout this extensive and voluminous record there is not one shred of evidence from which even an inference could be drawn that Johnson City or Washington County had policies, customs or long-standing practices in their training and supervision programs that were in any way causally linked to Craig Lanthorn's unfortunate death.

REASONS FOR DENYING THE WRIT

I. Standard for Deliberate Indifference in Jail Suicide Cases

Petitioners' main argument in support of their Petition for Certiorari is that the lower courts in this case, and the circuit courts of appeal in general, have misinterpreted *Farmer v. Brennan*, 511 U.S. 825 (1994).

In this Argument section, Respondents will set forth the *Farmer* standard and then explain why it is Petitioners who are misinterpreting *Farmer* as opposed to either the lower courts in this case or the circuit courts of appeal in general.

A. *Farmer Standard*

This Court in *Farmer* defined "deliberate indifference" as follows:

> For a claim . . . based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. . . . and that the state of mind [of the state actor] is one of "deliberate indifference" to inmate health or safety. *Farmer*, 511 U.S. at 834.

In fact, this Court in *Farmer* equated deliberate indifference with "criminal recklessness":

> We reject petitioner's invitation to adopt an objective test for deliberate indifference. We hold instead that a prison official cannot be found liable under the Eighth Amendment . . . unless the

> official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. *Farmer*, 511 U.S. at 837.

B. *Novel Standard Advanced by Petitioners*

Petitioners want to sue for the failure to prevent suicide without having to show any subjective knowledge of a substantial risk of suicide or self-harm. Petitioners argue that any other standard is too outcome specific. In other words, if a person has a medical need, there is a duty to provide the care regardless of whether the state actor recognizes a substantial risk of harm.

Petitioners clearly state their position on page 11 of their brief:

> If the red flags of risk are present and known to the jailer or are so obvious that a jailer's knowledge would properly be presumed, the duty to provide care is triggered whether or not the jailer is competent to differentially diagnose between a heart attack and indigestion or an aneurysm and a headache.

But this standard announced by Petitioners is simply not consistent with either *Estelle v. Gamble*, 429 U.S. 97 (1976) or *Farmer v. Brennan*, 511 U.S. 825 (1994).

For example, let's assume an inmate tells his jailer that his chest hurts. The jailer gives him two Alka-Seltzer for

indigestion and tells the inmate he will check with him in a couple of hours. In a couple of hours, the inmate is dead from a heart attack. While these facts might or might not support a state law negligence action (and in fact the Petitioners in this case have a state law negligence action presently pending against each of these respondents), the conduct of the jailer simply does not rise to the level of "deliberate indifference to a serious medical need."

Likewise, let's assume that an inmate is depressed. Just because the inmate might benefit from several counseling sessions with a mental health provider at some point in the future does not mean that he has a "serious medical need" or that there is a "substantial risk of serious harm." It is only when the jailer is criminally reckless with respect to the potential for self-harm that the conduct of the jailer can be said to be deliberately indifferent to a substantial risk of serious harm. *Estelle* uses the language of a "serious medical need" because it is a medical needs case. *Farmer* uses analogous language of "serious harm." No constitutional duty is violated for being deliberately indifferent to indigestion or deliberately indifferent to someone who is depressed and might need some counseling.

Therefore, what Petitioners are trying to do is sue for serious harm without having to establish subjective knowledge of a substantial risk of serious harm.

C. *Analysis Of Cases Cited By Petitioners*

On pages 11 and 12 of the Petition, the Petitioners cite various decisions in jail suicide cases for the proposition that courts have adopted a variety of widely inconsistent approaches to the problem of jail suicide — which has

resulted in a distortion of the principles set forth in *Estelle v. Gamble*, 429 U.S. 97 (1976) and *Farmer v. Brennan*, 511 U.S. 825 (1994).

But some of the cases are pre-*Farmer* decisions, *e.g.*, *Bowen v. City of Manchester*, 966 F.2d 13 (1st Cir. 1992); *Colburn v. Upper Darby Township*, 946 F.2d 1017 (3rd Cir. 1991), and therefore, cannot be distortions of the principles of *Farmer* (which provided guidance to the lower courts on the definition of deliberate indifference).

Furthermore, the other cases cited by Petitioners are all consistent with *Farmer's* requirement that in order to be liable for a constitutional violation a state actor must be deliberately indifferent to a substantial risk of serious harm.

In *Payne v. Churchich*, 161 F.3d 1030 (7th Cir. 1998), the court required a showing that the defendant foresaw a substantial risk of suicide. The court even noted that "knowledge of the substantial risk of suicide can be inferred from the obviousness of the risk." *Payne*, supra, at 1042. This holding tracks *Farmer* which requires subjective knowledge of the substantial risk of serious harm — but which also allows that subjective knowledge to be established by showing that the risk was so obvious. *Farmer*, 511 U.S. at 842. Furthermore, this court denied the petition for certiorari in *Payne*. *See Payne ex rel. Hicks v. Chuchich*, 119 S. Ct. 2339 (1999).

In *Lambert v. City of Dumas*, 187 F.3d 931, 937 (8th Cir. 1999), the court reviews *Farmer* and holds: "[T]he deliberate standard is met only if there were a 'strong likelihood, rather than a mere possibility,' that self-infliction of harm would result." The "strong likelihood" test equates with *Farmer's* criminal recklessness/substantial risk of serious harm requirements.

In *Barrie v. Grand County*, 119 F.3d 862, 869 (10th Cir. 1997), the court held: ". . . the custodian must be 'deliberately indifferent' to a substantial risk of suicide." This test is consistent with *Farmer*.

In *Williams v. Lee Co., Ala.*, 78 F.3d 491, 493 (11th Cir. 1996), the court held: ". . . to establish deliberate indifference to a suicide risk in this circuit, the official must have notice of a 'strong likelihood, rather than a mere possibility,' of *the* particular decedent's suicidal tendencies." (emphasis in original) This test is also consistent with *Farmer*.

In *Flores v. County of Hardeman, Tex.*, 124 F.3d 736, 738 (5th Cir. 1997), the court cited with approval *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996). *Hare* was a jail suicide case in which the court of appeals remanded to the district court the question of whether the defendants had actual knowledge of the substantial risk of suicide and whether the defendants responded to that substantial risk with deliberate indifference. Once again, this standard is consistent with *Farmer*.

All of these post-*Farmer* cases follow the *Farmer* standard. Petitioners cite no court of appeals decision supportive of their proposition that one can recover for the decedent's suicide without establishing a subjective knowledge of a substantial risk of self-harm.

The only case Petitioners cite for their proposition is *Owens v. City of Philadelphia*, 6 F. Supp. 2d 373 (E.D. Pa. 1998). The main issue addressed in *Owens* (but not resolved by the district court) is whether the standard of criminal recklessness or civil recklessness applies to the evaluation of the conduct of a state actor where the plaintiff is a pre-

trial detainee as opposed to a person who has been convicted of a crime. This is an issue not raised by the Petitioners in our case.

Although the *Owens* court does not resolve that issue, it does enunciate a criminal recklessness standard that is consistent with all of the court of appeals decisions cited by Petitioners. The *Owens* court held as follows at page 381:

> As the Court in *Farmer* pointed out: an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm would actually befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.

D. *Analysis of Sixth Circuit Precedent*

The Petitioners' main criticism of the district court (and consequently, the Sixth Circuit) in this case is that the court applied a "strong likelihood or near certainty" test. But a review of the district court's decision reveals that the standard relied upon was consistent with *Farmer* and the circuit court of appeals' decisions previously addressed in this brief.

Danese v. Asman, 875 F.2d 1239 (6th Cir. 1989), and its progeny, simply define what constitutes "deliberate indifference" in a jail suicide case — and it was defined as follows in *Barber v. City of Salem*, 953 F.2d 232, 240 (6th Cir. 1992):

> [T]he proper inquiry is . . . : whether the decedent showed a strong likelihood that he would attempt to take his own life in such a manner that failure

> to take adequate precautions amounted to deliberate indifference to the decedent's serious medical needs.

The biggest difference between Sixth Circuit precedent and *Farmer* is that *Farmer* makes it clear that the state of mind requirement must be proved using a subjective test. This arguably makes *Farmer* a more difficult standard for a plaintiff to hurdle, and this was recognized by the district court in its Memorandum of August 4, 1998 at page 6: "This clear recognition of a subjective component certainly did not ease the burden of proving deliberate indifference and arguably made the test more stringent." [Petition 24a, App. 43]

II. Response to Petitioners' Questions Presented for Review

Petitioners present three questions for the Court's review on page i of their Petition. However, those questions are never directly addressed in the Petition. As Respondents acknowledge that this Court can choose to accept any of Petitioners' questions for review, Respondents will address each question in turn with an explanation of why the question is inappropriate for this Court's review.

A. *Deliberate Indifference in Light of Jailer's Knowledge*

The first question presented by Petitioners is the following: "Whether jailers are deliberately indifferent when they know a detainee's disorientation, despondency, history of psychiatric care, recent involuntary commitment for suicide, and multiple requests for medical care, but refuse to provide either medical care or protection from self-injury." [Petition i]

Of the three questions presented for review, this is the only one that involves the application of *Farmer v. Brennan*, 511 U.S. 825 (1994). With respect to the law, and as discussed in the previous section, the standard relied upon by the lower courts in this case is entirely consistent with *Farmer*.

With respect to the facts, the individual jailers have a few comments. First, throughout this litigation, Petitioners have attempted to use all factual allegations against all jailers, regardless of whether a particular jailer had any knowledge of an alleged fact or not. For example, Jailer Garland had no knowledge of a history of psychiatric care or a recent involuntary commitment for suicide. Sergeant Jamerson and Jailer Mitchell had no knowledge of "requests for medical care."

Second, some of the "facts" are designed to mislead this Court. The allegation of "multiple requests for medical care" is an example of such a "fact." When Jailer Garland first saw Lanthorn, Lanthorn requested medical care several times in a matter of minutes. The EMS was summoned and arrived within a couple of minutes of Lanthorn's first request. After the EMS advised Jailer Garland that Lanthorn was okay to serve his time, there is no evidence that Lanthorn asked any person for medical care prior to his hanging twenty-two hours later. Of course, after the EMS left and before his hanging, he had interaction with jailers at the City Jail, a City Judge, an aunt and uncle, numerous other family members via telephone, a City transport officer and jailers at the County Jail.

Because the standard applied by the lower courts is consistent with *Farmer* and because there is not, as

Petitioners suggest, a "variety of widely inconsistent approaches," it is respectfully submitted that this Court should not grant certiorari on this question.

B. *Deliberate Indifference and the Failure to Train*

Petitioners also presented, but did not further discuss, the issue of "whether a city and county are deliberately indifferent when they fail to provide needed, readily-available training to address a known, pervasive risk of serious injury to the least culpable inmates — pretrial detainees with little or no criminal history." [Petition i]

Supreme Court Rule 14 states in pertinent part as follows:

> 1. A petition for writ for certiorari shall contain, in the order indicated:
>
> . . . .
>
> (h) A direct and concise argument amplifying the reasons relied on for allowance of the writ. See Rule 10.
>
> . . . .

While Petitioners mention the failure to train issue in the Argument section of their brief, they make no effort to explain why this Court should grant certiorari on a failure to train issue. Furthermore, the failure to train issue is governed by *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) — not *Farmer, supra*. Because Petitioners make no effort in their opening brief to comply with Rule 14, they should not

be permitted to make arguments in support of the grant of certiorari in their reply brief because this would put the governmental entity respondents at the disadvantage of being unable to respond to those arguments. *See Cheffer v. Reno*, 55 F.3d 1517, 1519 (11th Cir. 1995) (standing for the proposition that an issue listed in the statement of issues, but not addressed in the brief, is abandoned); *see also Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436, 1441 (7th Cir. 1992) (standing for the proposition that an argument not raised in the appellant's opening brief is waived).

C. *Excessive Force by Jailer Garland*

The final question listed by Petitioners for review is the following: "Whether a 380 pound corrections officer may have used excessive force against a pretrial detainee who was lying on the floor of his cell when an autopsy revealed bruising on the buttocks consistent with a shoe print or stomp." [Petition i]

Petitioners' Petition barely mentions the excessive force claim in their Argument section and makes no effort to comply with Rule 14 by explaining why this Court should grant certiorari. Furthermore, the analysis of the excessive force claim does not even involve the application of *Farmer*. Therefore, because Petitioners have made no effort in their opening brief to explain why this Court should grant certiorari on an excessive force claim, the petition for certiorari should be denied on this issue. Moreover, Petitioners should not be allowed to prejudice respondent Jailer Sam Garland, in his individual capacity, by belatedly making an effort to comply with Rule 14 in a reply brief — which would put this respondent in the position of being unable to respond.

Finally, if the Court decides to grant certiorari on this question, Jailer Garland, in his individual capacity, asserts that Petitioners have waived the right to introduce any statements by Lanthorn allegedly identifying Jailer Garland as his assailant. In the district court, Petitioners sought to introduce a statement made by Lanthorn to his aunt and uncle who visited him in the Johnson City Jail purportedly identifying Jailer Garland as his assailant. The district court ruled that the testimony was not admissible hearsay under Fed. R. Evid. 804(b)(5) because the statement does not have equivalent guarantees of trustworthiness based upon the intoxicated condition of Lanthorn. [Petition 71a-72a]

On appeal, Petitioners made no effort to contest that ruling. Instead, they proffered testimony of Jailer Garland in which he said that in response to him [Sam Garland] complaining to Lanthorn about Lanthorn kicking him, that Lanthorn replied: "You kicked me." [App. 1289]

In Respondent Jailer Garland's Sixth Circuit brief, he pointed out that the hearsay problem associated with Lanthorn's statement had not been addressed and was waived. [Garland Brief at p. 20]

In Petitioners' reply brief, they argued that Jailer Garland's admission is nonhearsay. See Ellis Reply Brief at p.17. But at oral argument, counsel for Jailer Garland pointed out to the Sixth Circuit that Fed. R. Evid. 801(d)(2) was inapplicable because the statement was not Jailer Garland's statement and Jailer Garland never manifested an adoption or belief in the statement's truth.

CONCLUSION

There is a surprising disconnect between the Petitioners' "Questions Presented for Review" and their "Legal Argument" section. The Legal Argument section asserts that this Court should grant certiorari based upon the fact that lower courts have distorted the principles of *Farmer v. Brennan*, 511 U.S. 825 (1994) when addressing jail suicide cases. But of the three questions presented for review, only the first question involves the application of *Farmer*. With respect to questions two and three, the Petition contains no coherent argument as to why this Court should grant certiorari.

On the issue of *Farmer*, a review of the cases cited by Petitioners reveals that the lower courts have in fact applied a consistent standard in jail suicide cases — including, and most importantly, the lower courts in this case. Moreover, Petitioners cite no authority for their novel argument that they should be able to recover for a suicide without having to establish subjective knowledge of a substantial risk of serious harm.

On the one hand, Petitioners recognize the difficulty in foreseeing the risk of self-harm:

> As Justice Stevens explained in *Barefoot v. Estelle*, 463 U.S. 880, 920-21 (1983) (concurrence), addressing the use of expert testimony in the context of sentencing hearings, "mental health professionals. . . . when predicting violence, dangerousness and suicide. . . . are far more likely to be wrong than right." *Citing* Morse, Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law, 51 S. Cal. L. Rev. 527, 600 (1978). [Petition 14]

But while Petitioners acknowledge the difficulty of recognizing the likelihood of self-harm for someone who is a professional, they would have this Court adopt a standard for jailers that is closer to negligence than it is to deliberate indifference which this Court has defined as criminal recklessness.

It is respectfully submitted that this Court should deny the Petition for Certiorari because there has been no misapplication of the *Farmer* standard and because, with respect to two out of the three questions presented for review, Petitioners have made absolutely no effort to comply with Supreme Court Rule 14. Finally, these Petitioners should not be given an opportunity in a reply brief to advance arguments for the first time that were not presented in the opening brief.

Respectfully submitted,

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